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SHAHID BUTTAR FOR CONGRESS COMMITTEE and  
SHAHID BUTTAR

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SHAHID BUTTAR FOR CONGRESS  
COMMITTEE and SHAHID BUTTAR, an  
individual;

*Plaintiffs,*

vs.

HEARST COMMUNICATIONS, INC., a  
Delaware corporation; and DOES 1  
through 5;

*Defendants.*

CASE NO. 3:21-cv-05566-EMC

**PLAINTIFFS' OBJECTIONS TO  
DEFENDANT'S REQUEST  
FOR JUDICIAL NOTICE**

Hearing Date: Mar. 17, 2022, 1:30 pm

JUDGE: Hon. Edward M. Chen  
COURTROOM: 5 – 17<sup>th</sup> Floor

**I. Introduction**

Plaintiffs Shahid Buttar for Congress Committee and Shahid Buttar **object to** Defendant Hearst Communications, Inc.'s Request for Judicial Notice (Dkt. 29), pursuant to *Khoja v. Orexigen Therapeutics, Inc.*<sup>1</sup>

**II. Applicable Law**

*Judicial Notice.* A court may take judicial notice of a matter “not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy

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<sup>1</sup> *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9<sup>th</sup> Cir. 2018).

1 cannot reasonably be questioned.”<sup>2</sup> However, as the Ninth Circuit recently admonished in *Khoja*  
2 (a binding case not even mentioned by Defendant),<sup>3</sup> a district court is generally barred from  
3 “consider[ing] material outside the pleadings when assessing the sufficiency of a complaint *under*  
4 *Rule 12(b)(6)* of the Federal Rules of Civil Procedure.”<sup>4</sup> If material outside the pleadings are  
5 “presented and not excluded by the court,” a motion to dismiss converts into a Rule 56 motion for  
6 summary judgment, where both parties “must have the opportunity to present *all* the material that  
7 is pertinent to the motion.”<sup>5</sup>

9 Although judicial notice may be taken of extrinsic documents, the Ninth Circuit has  
10 admonished that the “*overuse and improper application* of judicial notice can lead to *unintended*  
11 *and harmful results*” – because the “unscrupulous use of extrinsic documents to resolve  
12 competing theories against the complaint risks *premature dismissals of plausible claims* that may  
13 turn out to be valid after discovery.”<sup>6</sup>

15 Put another way, “[i]f defendants are permitted to present *their own version of the facts* at  
16 the pleading stage – and district courts accept those facts as uncontroverted and true – it becomes  
17 near *impossible* for even the most aggrieved plaintiff to demonstrate a sufficiently ‘plausible’  
18 claim for relief.”<sup>7</sup>

19 While it may take judicial notice of “matters of public record”, a court “cannot take  
20 judicial notice of disputed *facts* contained in such public records.”<sup>8</sup> Any request for judicial  
21 notice must provide the “*purpose* for which [it] was offered.”<sup>9</sup> To that end, a court must be

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23 <sup>2</sup> Fed. R. Evid. 201(b).

24 <sup>3</sup> See ABA Model Rule 3.3(a)(2) (counsel has ethical duty to disclose binding authority that  
25 is “directly adverse” to client’s position).

26 <sup>4</sup> *Khoja*, 899 F.3d at 998 (italics added).

27 <sup>5</sup> *Id.* at 998 (italics added).

28 <sup>6</sup> *Khoja*, 899 F.3d at 998 (italics added).

<sup>7</sup> *Id.* at 999 (italics added).

<sup>8</sup> *Id.* at 999.

<sup>9</sup> *Khoja*, 899 F.3d at 1000 (italics added).

1 apprised as to which *specific* “fact or facts” for which judicial notice is requested.<sup>10</sup> Moreover,  
2 any such evidence must be relevant<sup>11</sup> and not inflict the opposing party with undue prejudice.<sup>12</sup>

### 3 **III. Legal Analysis**

4 Plaintiffs object to the **Exhibits A through G** of the Ibarguen Declaration, as follows:

5 *Exhibit A.* Plaintiffs object to taking judicial notice of the online version of the July 22,  
6 2020 print article at issue, on three grounds. *First*, Defendant fails to apprise the Court as to  
7 which *specific* “fact or facts” for which it seeks judicial notice.<sup>13</sup> *Second*, Plaintiffs object to the  
8 extent that Defendant seeks judicial notice of disputed facts. *Finally*, Plaintiffs object to the  
9 extent that taking judicial notice would imply that the July 22, 2020 print article did not *republish*  
10 the defamatory content of its online version (which was published online on the evening of July  
11 21, 2020).<sup>14</sup>

12 *Exhibit B.* Similarly, Plaintiffs object to taking judicial notice of the online version of the  
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15 <sup>10</sup> *Id.* at 999.

16 <sup>11</sup> *E.g.*, *Cuellar v. Joyce*, 596 F.3d 505, 512 (9<sup>th</sup> Cir. 2010) (denying judicial notice because  
17 proffered materials were not relevant); *Donastorg. v. Riverside County Sheriff’s Dep’t*, No. 12-  
18 1654, 2014 U.S. Dist. LEXIS 91169, at \*6-\*7 (C.D. Cal. May 7, 2014) (same); *Chyna v. Bayview*  
19 *Loan Servicing, LLC*, No. 14-cv-01415, 2016 U.S. Dist. LEXIS 133849, at \*9 n.3 (same).

20 <sup>12</sup> *E.g.*, *Keyes v. Coley*, No. 09-1297, 2011 U.S. Dist. LEXIS 59625, at \*8-\*9 (E.D. Cal.  
21 June 2, 2011) (denying judicial notice on the ground that the proffered evidence was irrelevant,  
22 unduly prejudicial, and hearsay); *Cooper v. Redding*, No. 8:15CV441, 2017 U.S. Dist. LEXIS  
23 10942, at \*2 (D. Neb. Jan. 26, 2017) (denying judicial notice on the ground that the proffered  
24 evidence was unduly prejudicial).

25 <sup>13</sup> *See Khoja*, 899 F.3d at 999.

26 <sup>14</sup> *See Traditional Cat Assn., Inc. v. Gilbreath*, 118 Cal.App.4<sup>th</sup> 392, 401 (Cal.Ct.App. 2004)  
27 (“repetition of the defamatory statement in a *new edition* of a book or *newspaper* constitutes a  
28 *new publication* of the defamation that may give rise to a new cause of action”) (italics added);  
*Yeager v. Bowlin*, 693 F.3d 1076, 1082 (9<sup>th</sup> Cir. 2012) (defamatory content republished when it is  
reprinted in a different format, such from hardcover to paperback); *Kanarek v. Bugliosi*, 108  
Cal.App.3d 327 (Cal.Ct.App. 1980) (same); *Church of Scientology v. Dell Publishing Co.*, 362  
F.Supp. 767, 770 (N.D. Cal. 1973) (same); *Shively v. Bozanich*, 31 Cal.4<sup>th</sup> 1230, 1243 (Cal. 2003)  
(same); *Salyer v. Southern Poverty Law Center*, 701 F.Supp.2d 912, 914 (W.D. Ky. 2009)  
(defamatory material is republished where it has been distributed for a second time “with the goal  
of reaching a new audience”). *See also Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512  
F.3d 137, 146 (5<sup>th</sup> Cir. 2007) (Fifth Circuit notes that if a print article is posted online, it reaches a  
“new audience”) (*citing Firth v. State*, 775 N.E.2d 463, 466 (N.Y. 2002)).

1 July 25, 2020 print article at issue, on four grounds. *First*, the Complaint neither refers nor  
2 provides a hyperlink to the online version of the July 25, 2020 print article. *Second*, Defendant  
3 fails to apprise the Court as to which *specific* “fact or facts” for which it seeks judicial notice.<sup>15</sup>  
4 *Third*, Plaintiffs object to the extent that Defendant seeks judicial notice of disputed facts.  
5 *Finally*, Plaintiffs object to the extent that it implies that the July 25, 2020 print article did not  
6 *republish* the defamatory content of its online version (which was published online on the  
7 evening of July 24, 2020).<sup>16</sup>

9 *Exhibit C.* Plaintiffs object to taking judicial notice of Mathew S. Bajko’s July 21, 2020  
10 article published in the *Bay Area Reporter*, on two grounds. *First*, Defendant fails to apprise the  
11 Court as to which *specific* “fact or facts” for which it seeks judicial notice.<sup>17</sup> *Second*, Plaintiffs  
12 object to the extent that Defendant seeks judicial notice of disputed facts.

14 *Exhibit D.* Plaintiffs object to taking judicial notice of Akela Lacy’s July 23, 2020 article  
15 published in the *Intercept*, on two grounds. *First*, Defendant fails to apprise the Court as to which  
16 *specific* “fact or facts” for which it seeks judicial notice.<sup>18</sup> *Second*, Plaintiffs object to the extent  
17 that Defendant seeks judicial notice of disputed facts.

18 *Exhibit E.* Plaintiffs object to taking judicial notice of Joe Eskenazi’s July 21, 2020 article  
19 published in *Mission Local*, on three grounds. *First*, the article is not relevant, for Plaintiffs’  
20 Complaint neither cites nor quotes from Mr. Eskenazi’s article.<sup>19</sup> *Second*, Defendant fails to  
21 apprise the Court as to which *specific* “fact or facts” for which it seeks judicial notice.<sup>20</sup> *Finally*,  
22 Plaintiffs object to the extent that Defendant seeks judicial notice of disputed facts.  
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25 <sup>15</sup> See *Khoja*, 899 F.3d at 999.

26 <sup>16</sup> See note 14 *supra*.

27 <sup>17</sup> See *Khoja*, 899 F.3d at 999.

28 <sup>18</sup> See *id.* at 999.

<sup>19</sup> See note 11 *supra*.

<sup>20</sup> See *Khoja*, 899 F.3d at 999.

1           *Exhibit F.* Plaintiffs object to taking judicial notice of Tim Redmond’s July 21, 2020  
2 article published in *48 Hills*, on three grounds. *First*, the article is not relevant, for Plaintiffs’  
3 Complaint neither cites nor quotes from Mr. Redmond’s article.<sup>21</sup> *Second*, Defendant fails to  
4 apprise the Court as to which *specific* “fact or facts” for which it seeks judicial notice.<sup>22</sup> *Finally*,  
5 Plaintiffs object to the extent that Defendant seeks judicial notice of disputed facts.  
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7           *Exhibit G.* Plaintiffs object to taking judicial notice of Elizabeth Croydon’s self-published  
8 *Medium* post from July 21, 2020, on three grounds. *First*, Ms. Croydon’s self-published post,  
9 which contains the allegations of sexual harassment at issue, does not qualify under FRE 201 –  
10 because her self-published post is not a source “whose accuracy cannot reasonably be  
11 questioned”. *Second*, Defendant fails to apprise the Court as to which *specific* “fact or facts” for  
12 which it seeks judicial notice.<sup>23</sup> *Finally*, Plaintiffs object to the extent that Defendant seeks  
13 judicial notice of disputed facts.  
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#### 15       **IV. Conclusion**

16           *If defendants are permitted to present their own version of the facts at the pleading stage*  
17 *– and district courts accept those facts as uncontroverted and true – it becomes near impossible*  
18 *for even the most aggrieved plaintiff to demonstrate a sufficiently plausible claim for relief.*

19           -- Ninth Circuit, *Khoja v. Orexigen Therapeutics, Inc.*<sup>24</sup>  
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21           As we have shown, Defendant has failed to show why Exhibits A through G of the  
22 Ibarguen Declaration should be judicially noticed or incorporated by reference. Accordingly,  
23 Defendant’s infirm Request must be **denied** as to those documents, and any part of its papers  
24 relying on such barred evidence must be **disregarded**.  
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26       <sup>21</sup>       *See* note 11 *supra*.

27       <sup>22</sup>       *See Khoja*, 899 F.3d at 999.

28       <sup>23</sup>       *See id.* at 999.

<sup>24</sup>       *Id.* at 999 (italics added).

1 DATED: Jan. 25, 2022

2  
3 BUSINESS, ENERGY, AND ELECTION  
4 LAW, PC

5  
6 By: /s/ Gautam Dutta

7 GAUTAM DUTTA, ESQ.

8 Attorneys for Plaintiffs

9 SHAHID BUTTAR FOR CONGRESS

10 COMMITTEE and SHAHID BUTTAR  
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